

April 21, 2009

Office of Policy and International Affairs
U.S. Copyright Office
Room LM-403
James Madison Building
101 Independence Avenue, SE
Washington, DC 20559

**RE: Comments in Response to Notice of Inquiry on Facilitating Access to
Copyrighted Works for the Blind or Persons With Other Disabilities**

Pursuant to the Notice of Inquiry and Request for Comments published by the U.S. Copyright Office in the Federal Register, 74 FR 13,268 (daily edition, March 26, 2009), the Association of American Publishers ("AAP") submits these Written Comments on behalf of its members regarding facilitation of access to copyrighted works for the blind or persons with other disabilities.

As the principal national trade association of the U.S. book publishing industry, AAP represents some 300 member companies and organizations that include most of the major commercial book and journal publishers in the United States, as well as many small and non-profit publishers, university presses and scholarly societies. AAP members publish literary works in hardcover and paperback formats in every field of human interest, including trade books of fiction and non-fiction; textbooks and other instructional materials for the elementary, secondary, and postsecondary educational markets; reference works; and scientific, technical, medical, professional and scholarly books and journals. In addition to publishing in print formats, AAP members are active in the ebook and audiobook markets, and also produce computer programs, databases, Web sites and a variety of multimedia works for use in online and other digital formats. AAP advocates the public policy interests of its members, including the protection of intellectual property rights in all media; the defense of both the freedom to read and the freedom to publish at home and abroad; the advancement of education; and, the promotion of literacy and reading.

Introduction

While AAP and its member publishers have long cooperated with advocacy groups and federal and state efforts to make accessible materials available for individuals with print disabilities, we are now placing more focus on publishers' creation of innovative, flexible market-based solutions to meet these needs. This view reflects a number of factors. Experience shows that the regulatory solutions have not succeeded in solving the problem in all of the circumstances in which it arises and have, in fact, sometimes created complex new challenges for publishers and users. New and inconsistent legislative layers are being added in many states. Publishers find that advocates, users and DSS offices have diverse views on the preferred technologies and approaches to meet the needs. Finally, as technology has developed and the definition of eligible users has expanded, it seems more likely that the greatest accessibility can be achieved by giving publishers and other market participants the incentives to make materials available for all users, including those with print disabilities.

Background: Our History of Activity

AAP and its members have a long record of accomplishment in their cooperative efforts to meet the special needs of individuals who are blind or have other print disabilities that make it difficult or impossible for them to read books and other printed materials. Working with Congress, the U.S. Department of Education, State legislatures and educational agencies, and a variety of advocacy groups for individuals with print disabilities, AAP has been a key partner in some of the more notable initiatives undertaken to address these special needs over the past fifteen years, including the following:

Chafee Amendment (17 U.S.C. Section 121) – Enacted in 1996 with the support of AAP, the National Federation of the Blind (NFB), the American Foundation for the Blind (AFB), the American Printing House for the Blind (APHB), Recording for the Blind and Dyslexic (RFB&D), and the U.S. Copyright Office, this landmark federal legislation established a limited exemption under U.S. copyright law to permit certain authorized entities to reproduce and distribute copies of previously published, non-dramatic literary works in specialized formats exclusively for use by “blind or other persons with disabilities,” without the need to first obtain permission from the copyright owners of such works.

The Chafee Amendment was intended to provide greater efficiency in the production of accessible copies of such works for individuals with print disabilities, saving time and resources for trusted intermediaries such as APHB, RFB&D and the Library of Congress’s National Library Service for the Blind and Physically Handicapped, based on the recognition that such reproduction and distribution in the absence of permission or a statutory exemption would infringe the copyright owner’s reproduction and distribution rights. Since its enactment, the Chafee Amendment has been a great benefit to the work of these entities, State and local educational agencies, and university disability student services (DSS) offices (among others) in enabling them to meet the reading needs of persons who are blind, visually impaired or have other disabilities resulting from physical limitations or organic dysfunction that make them unable to read or otherwise use standard printed materials. It has also served as the legal basis for establishing and expanding what is now the world’s largest accessible online library for individuals with print disabilities.

State Accessibility Legislation – Every year, for well over the past decade, a number of State legislatures have considered (and, sometimes, enacted) a variety of legislative proposals to ensure the timely availability of accessible instructional materials for students with print disabilities.

Typically, these proposals involve statutory or regulatory requirements, usually implemented through contractual provisions related to the adoption or procurement of textbooks and other instructional materials, that obligate publishers to provide electronic files in one of several specified file formats for use as source files from which accessible versions of the instructional materials may be produced and provided to students who are qualified to obtain them. Increasingly, over the past five years, similar legislative proposals have sought to address accessibility issues for students with print disabilities in the very differently structured institutional and academic environments of colleges and universities.

AAP and its member publishers do their best to work with State legislators in shaping the provisions of accessibility legislation to serve the practical goal of meeting the special needs of students with print disabilities in an efficient and workable manner that does not impose unwarranted economic burdens on publishers or permit widespread unauthorized distribution and use of their electronic files or the copies of curriculum materials that are created from such files. However, in many States, the legislative process has not been readily accessible to the publishing community or responsive to its input, resulting in proposed accessibility legislation that publishers are unable to support because of practical problems with provisions addressing key issues such as the scope of covered curriculum materials; the eligibility criteria for students to receive curriculum materials in specialized formats; the acceptability of certain formats for the electronic files to be provided by publishers; the timeframe and conditions for the provision of such files by publishers; the manner in which such files may be accessed and used by third parties for the conversion process that reproduces curriculum materials in needed specialized formats; and, the related obligations of students in connection with their receipt and use of either the electronic files provided by publishers or the curriculum material in specialized formats that are produced from such files.

AAP and its member publishers are increasingly concerned about the substantial recurring expenditures of time and resources that they must commit every year to participate in the consideration of such legislation in concurrent legislative sessions of multiple States. Enactment of new State laws only adds to an increasingly complex patchwork of diverse and often inconsistent State compliance requirements for publishers whose markets extend across State lines and national borders. Despite these drawbacks, AAP and its member publishers have established a long record of good faith efforts to help State legislators develop workable initiatives for State agencies, schools and colleges to meet the accessibility needs of students with print disabilities.

Bookshare, Inc. – At first, AAP responded cautiously to the overtures from Benetech, when the innovative nonprofit assistive technology organization sought publishers’ assistance in establishing a website-based accessible digital library subscription service for individuals with print disabilities. Soon, however, AAP began helping Bookshare obtain credibility as an “authorized entity” under the Chafee Amendment, encouraging publishers and authors to accept and support Bookshare’s policies and practices for “scanning” or acquiring digital files of print books that qualifying subscribers to the Bookshare library service can download in accessible DAISY and BRF digital formats.

AAP’s support reflected Bookshare’s expression of sensitivity to the legitimate concerns of copyright owners, and its pursuit of a declared intent to ensure that its operations are “Chafee-compliant” by working with AAP on matters such as its Seven Point Digital Rights Management Plan and the terms of its legal agreements with qualifying members, volunteers and contributing publishers and authors. Although there is concern, particularly among some educational publishers, about Bookshare’s persistent efforts to grow its library collection and expand the reach of its services to the academic and international communities, AAP nonetheless continues to maintain an ongoing cooperative relationship with Bookshare that has helped to establish a more collaborative environment in which Bookshare has been able to reach agreements with major publishers who promise their cooperation in making tens of thousands of books in

accessible formats available to individuals with print disabilities through Bookshare's online library services.

IDEA Amendments of 2004 – For more than two years, AAP worked with a coalition of disabilities advocacy groups to figure out how to ensure the timely provision of accessible textbooks and other core instructional materials to elementary and secondary school students with print disabilities. Although a number of States had attempted to address the problem of timely provision by imposing electronic file submission requirements on publishers in the context of their contractual agreements with State and local education agencies for the purchase of such materials, the patchwork diversity of the requirements imposed by different States – and sometimes within individual States – tended to aggravate, rather than mitigate, administrative obstacles to the efforts of education officials, while creating confusion and inefficiencies among the K-12 educational publishers whose markets cross State boundaries.

Publishers had to be prepared to produce multiple electronic files in different formats for each of their textbooks or other core instructional materials in order to comply with the individual requests for such files received from different States or different localities within a single State. Unfortunately, the file formats widely used by publishers for ordinary publications were wholly unsuitable for use in reproducing those materials in specialized formats for individuals with print disabilities. The process of converting those files into formats more suitable to that purpose is costly and labor-intensive, and these factors were compounded by the fact that the file format most commonly requested from the publisher – ASCII text – was not only difficult for the publisher to produce and useless to the publisher after production, but was also ill-suited for efficient conversion into specialized formats because it required laborious “tagging” to structure the file to reflect the actual visual characteristics of the printed materials.

In addition to delays attributable to technical elements of the conversion process, delays in the educational agencies' file request processes, including difficulties in identifying and locating the appropriate publisher contact that could act on a request, contributed to the problem. Delays also occurred in the handling process through which the electronic file provided by the publisher eventually reached the people who actually use the file to reproduce and distribute the embodied content in accessible specialized formats.

In response to these problems, AAP and the disabilities advocacy groups crafted the proposed “Instructional Materials Accessibility Act” as federal legislation designed to address the cause of these delays and inefficiencies by requiring that the publishers' electronic files be uniformly provided to a central national repository where they could be requested for use by State and local agencies in an XML-based format that would offer the capability for more flexible tagging to reproduce print materials in specialized formats with greater efficiency, quality and interoperability. After months of intensive lobbying by the coalition of AAP and the disability advocacy groups, a revised version of this legislation was enacted as provisions of the Individuals with Disabilities Education Improvement Act of 2004, P.L.108-446, and the proposed legislation's key “national file format” and “central national repository” features were eventually implemented as the National Instructional Materials Information Standard (“NIMAS”) and the National Instructional Materials Access Center (“NIMAC”).

Higher Education Opportunity Act – AAP efforts to address the accessibility needs of students with print disabilities at institutions of higher education have been no less determined or ongoing than its efforts to meet the needs of such students at the elementary and secondary school level. However, these efforts have had to take into account key differences in both the nature of the instructional materials at issue and the manner in which these instructional materials are selected and acquired for use by students at these different levels of educational instruction.

For elementary and secondary school students, textbooks and other core instructional materials for different subjects at different grade levels are generally selected by State or local education agencies according to a standardized curriculum, and the State or local educational agencies purchase these materials in bulk for students to use on loan but then return to school officials after the academic term so they can be redistributed for use by students at the same class level during the next academic term. This highly centralized structure for selection and acquisition of core instructional materials, which facilitates the ability to implement uniform file format and central repository submission requirements for electronic files to be used in creating accessible specialized formats, has no counterpart at institutions of higher education. At colleges and universities, instructional materials are selected by faculty for each section of a course in much greater variety than is found at the elementary and secondary school level. They typically differ from section to section within the same course, and have to be purchased or otherwise acquired by individual students in each course section. Such materials are purchased by students with the expectation that they will either keep the materials as their own property or seek to recoup part of the purchase costs by selling the materials to other students or to a bookstore at the close of the academic term.

Given these fundamental differences, AAP has worked with its member higher education publishers, disability student service (“DSS”) offices at institutions of higher education and disabilities advocacy groups to look beyond the measures devised for elementary and secondary school students, trying to develop solutions that better fit this more diverse and decentralized process. Through a number of publishers, college students with print impairments can obtain, through their campus DSS office, electronic files of almost every textbook published within the past nine years. Some publishers offer a user-friendly electronic request form and efficient technology applications that result in expeditious file delivery directly to the requestor for the majority of requests. A single AAP member publisher has provided over 50,000 files to disability student service offices since 2002.

In pursuit of such solutions, AAP worked with Members of Congress from 2007 through 2008 to craft and support enactment of provisions in legislation to reauthorize the Higher Education Act of 1965, as amended. These provisions created an Advisory Commission on Accessible Instructional Materials in Postsecondary Education for Students with Disabilities, which is charged with making recommendations to Congress after “conducting a comprehensive study to assess the barriers and systemic issues that may affect, and technical solutions available that may improve, the timely delivery and quality of accessible instructional materials for postsecondary students with print disabilities.” Provisions in this legislation also provide support and direction for “model demonstration programs to support improved access to postsecondary instructional materials for students with print disabilities,” with Congress authorizing funding for such programs through fiscal year 2014.

AccessText Network – While working with Congress, AAP and its member higher education publishers continued to seek opportunities to work with institutions of higher education, relevant disabilities advocacy groups and technology experts to devise ways to make it quicker and easier for college and university students with print disabilities to obtain the accessible textbooks and other instructional materials they need. Initially, these efforts produced the Publisher Look-Up Service, a website interface that was first established in July 2006 as a place where DSS offices could search for electronic text and permissions contacts at higher education publishing companies.

While many publishers have been highly successful in making their materials available to DSS offices for their students, AAP announced in December 2008 a major leap forward in the form of its agreement with the Alternative Media Access Center (an initiative of the Georgia Board of Regents and the University of Georgia) to develop and launch a comprehensive, national online system that will expand the timely delivery of print materials to campus-based DSS offices by many more publishers, and streamline the permission process for scanning copies of print textbooks when publisher files are unavailable.

Funded through donations by AAP member higher education publishers Cengage Learning; CQ Press; Bedford/St. Martin's, W.H. Freeman, Worth Publishers; McGraw-Hill Education; Pearson; Reed Elsevier Inc.; John Wiley & Sons; and W.W. Norton, the AccessText Network is being created without legislation or taxpayer dollars, and will leverage Quickbase, an online database powered by Intuit, Inc., to enable publishers and institutions of higher education to effectively combine and share their resources and expertise to ensure that those institutions can more easily obtain information about publishers' course materials, request electronic text files and use more efficient acquisition and distribution channels. The system is scheduled for beta launch later in the spring of this year, and work continues on its technical infrastructure while membership agreements with DSS offices and academic publishers are finalized and the technical team works with charter publisher members to import more than 300,000 book title records to populate the database application.

Google Book Search Litigation Settlement Agreement – Although clearly a departure from the other means and venues through which AAP has worked to address the needs of students with print disabilities at institutions of higher education, the proposed Settlement Agreement announced in October 2008 in the Google Book Search class action litigation (which, if approved by the court, will resolve pending lawsuits brought by authors and publishers against Google for its scanning of copyrighted books under the Google Book Search Library Project) contains specific provisions that, in the words of an NFB press release, “will have a profound and positive impact on the ability of blind people to access the printed word.” Crafted with the active involvement and support of AAP, these provisions will address the accessibility needs of individuals with print disabilities in connection with their use at fully participating libraries of the library digital copies of millions of books scanned through the Library Project. The Settlement Agreement also proposes offering an Accommodated Service for those users of the proposed Institutional Subscription service who have print disabilities, providing them access to the combined collection of library digital copies from all of the libraries participating in the Library Project on the same basis as other users without disabilities.

Moving Forward with Lessons Learned

Through its involvement in these varied efforts to help ensure that its members' printed publications are accessible to individuals with print disabilities, AAP has learned at least two lessons that it hopes will not be ignored by governmental authorities as they consider possible prescriptive solutions to accessibility issues through law and regulation.

One lesson is that the rapid development of technology and our evolving understanding of human disabilities can quickly challenge the basic assumptions underlying even the most carefully crafted regulatory approach to meeting the accessibility needs of individuals with print disabilities, leading to assertions that the supporting law or regulation is outdated in its scope and should be applied more broadly to effectuate current needs.

The case in point is the Chafee Amendment, despite the fact that, at the time of its enactment in 1996, there was a broad consensus among AAP, NFB, AFB, APHB, RFB&D, and the U.S. Copyright Office that the legislation was, in the words of its chief sponsor and namesake, "a very simple amendment." Speaking on the Senate floor in support of his amendment, Senator John Chafee (R-RI) discussed the concept of the "authorized entity" that would be allowed to reproduce and distribute certain copyrighted works in specialized formats for "blind or other persons with disabilities" without permission from the copyright owner, and explained that his amendment "includes a very narrow definition of those who are eligible to undertake such production and applies the definition for eligibility used by the National Library Service to those who receive reproductions."

But, in the years since its enactment, the Chafee Amendment has been embroiled in debates regarding who qualifies as an "authorized entity," what kinds of "audio" or "digital text" reproductions constitute permissible "specialized formats," and under what circumstances can an individual qualify as an eligible beneficiary within the definition of "blind or other persons with disabilities." Such disputes are not abstract or academic, as they have complicated efforts to enact and implement other laws that have been built on the foundation of the Chafee Amendment, including various pieces of State legislation and the IDEA Act of 2004. Unfortunately, they have also occasionally increased tensions between the publishing community and disabilities advocates.

These key definitional limitations on the applicability of the Chafee Amendment were critical to the AAP's support for its provisions allowing entities like APHB, RFB&D and the National Library Service to reproduce and distribute copies of copyrighted works without obtaining permission from or paying compensation to the copyright owners. The key economic premise underlying the Chafee Amendment, as noted in contemporaneous Congressional testimony by the Register of Copyrights (which was referenced in Senator Chafee's floor remarks), was that "blind and physically handicapped readers" did not constitute a "viable commercial market" for publishers. Under those circumstances in 1996, it was assumed that publishers would not be likely to publish for that defined market and therefore would not experience economic harm if the law allowed a select group of governmental agencies and non-profit organizations to serve that specifically-defined population by reproducing and distributing copies of copyrighted works

in “specialized formats” requiring special playback equipment not generally available to or used by the general public.

Yet, today the Chafee Amendment is being cited as support for accessibility solutions for a much larger group of individuals with “learning disabilities,” a term that eludes singular definition even in relevant federal statutes but which clearly would exponentially expand the originally-conceived eligible beneficiary population under the Chafee Amendment from a few hundred thousand individuals in the United States to millions. At the same time, we are also hearing calls citing the Chafee Amendment as a basis for maximizing the use of digital technology capabilities for pedagogical purposes that reach beyond accessibility needs. These types of products – such as the “digital talking book,” which is now the preferred choice among “specialized formats” – closely resemble standard commercial ebooks and audiobooks, and defy the Chafee Amendment’s conception of “specialized formats” requiring special playback equipment that is not generally available to the public and “exclusively for use” by persons with print disabilities. The demands to expand the eligible beneficiary population to individuals with “learning disabilities,” combined with the evolution of accessible “specialized formats” to include standard technologies used by large numbers of users without any disabilities, raise both concerns and opportunities for publishers. On the one hand, “digital talking books” may lead to a new generation of third-party organizations seeking “authorized entity” status to serve a much broader population than the Chafee Amendment was intended to serve. At the same time, publishers are now more routinely creating products themselves to serve this broader population, including individuals with print disabilities. But, overall, none of this bodes well for continued reliance on the Chafee Amendment as the primary lodestone for meeting the reading and learning needs of individuals with reading disabilities.

The other lesson is that “one size fits all” solutions are not necessary, appropriate or sufficient to meet the accessibility needs of all individuals with print disabilities, and imposing such solutions by regulatory mandates will delay introduction of more effective market-based responses.

This observation might seem ironic in light of AAP’s persistent efforts to eliminate the patchwork confusion of different and, often, conflicting State laws addressing the needs of students with print disabilities by replacing them with national laws that address the same issues in a consistent and uniform manner nationwide. However, the consensus among stakeholders that is necessary for successfully crafting and implementing such umbrella schemes has proven to be highly elusive and extremely fragile in AAP’s experience, a direct result of the different circumstances in which the accessibility problems of individuals with print disabilities arise and must be addressed.

As previously noted, the circumstances of students with print disabilities in elementary and secondary schools differ significantly from those at colleges and universities. These differences affect all potential parties involved in addressing the accessibility needs of the students, including State or local agencies, the teachers and academic officials involved, and the publishers of the textbooks and other instructional materials at issue.

With respect to the IDEA Amendments of 2004, the original consensus to pursue a single federal approach preempting conflicting State laws and creating uniform, national requirements for a single file format and the submission of publisher files into a central national repository ran afoul of a classic “federalism” issue. The objections of a single State to these arrangements were supported by the U.S. Department of Education and key Congressional leaders, thus leading to the rejection of a critical condition for achieving the efficiencies that the carefully negotiated federal legislation was designed to secure.

Post-enactment efforts to implement the key NIMAS and NIMAC requirements of this same legislation also demonstrated the limited ability to obtain and maintain a consensus within the coalition that AAP and its member publishers had formed with advocacy groups representing persons with visual impairments and other print disabilities. As working groups met to hash out the technical details of the proposed NIMAS file format standards, for example, competing agendas and viewpoints emerged among various advocacy groups regarding what they believe to be in the best interests of the disabilities communities they serve. These differences extended to their views on the most desirable accessible formats, including most notably the relative utility of Braille for different levels and subjects of academic study and the question of who should be authorized to access the publisher files deposited in the newly established NIMAC. Disagreements over this aspect of NIMAC implementation continue to this day, delaying full realization of the expected benefits of the national repository, despite the fact that (according to the APHB, which manages NIMAC) the participation of publishers, States, authorized users, and accessible media producers has greatly increased year after year, as has the number of certified NIMAS-compliant electronic files available for download.

Worse still, this effort to move away from the patchwork of diverse State requirements toward a uniform, national arrangement has failed to diminish new State legislative activity. According to AAP’s School Division, at least 150 State bills, regulations, and contract provisions that impact K-12 publishers on accessibility matters have been proposed in the wake of the enactment of the IDEA Amendments, with some 15-20 of these proposals becoming law or otherwise affecting contractual terms between State or local education agencies and K-12 publishers. The majority of these have been of major concern to AAP and its K-12 members because they proposed to require additional file formats besides NIMAS; expand the definition of covered instructional materials; and impose new requirements for math materials that would necessitate changes to content by transcribers without publisher consultation.

The expansion of the Chafee-eligible beneficiary population to include all individuals with learning disabilities, together with the prospect for an expanded class of “authorized entities” to serve this population with increasingly commercial technologies like digital talking books, undercuts the economic premise underlying the Chafee Amendment. These developments argue for a paradigm shift away from the copyright exemption-based “regulatory” approach for meeting the accessibility needs of the disabilities communities in favor of a “market-based” approach, under which publishers would produce market-ready, accessible versions of their copyrighted books, in forms like audiobooks or ebooks, without the need for reproduction and distribution in “specialized formats” by third-party “authorized entities” acting under an exemption from copyright infringement liability.

The shift to a market-based approach is consistent with the disabilities communities' call for "universal design" of consumer products, *i.e.*, designing and manufacturing a product so that needed accommodations for users with disabilities are already part of the product when it is introduced into the market, rather than requiring some form of retrofitting, conversion or adaptation of the product in order to provide such accommodations. Perversely, however, the continuing role of the Chafee Amendment provides a potent disincentive for publishers to make the necessary investments to bring universally designed products to the market. Publishers understandably will be reluctant to bring such accessible products to the market as long as third-parties can continue to cite the Chafee Amendment as a legal basis for reproducing and distributing competing accessible versions of the copyrighted work or, worse yet, for reproducing and distributing copies of the universally-designed products themselves.

AAP understands that repeal of the Chafee Amendment could be problematic because publishers do not yet produce all of their products in formats of universal design, and educational institutions have the desire and obligation to accommodate the accessibility needs of qualified students in the absence of such commercially-produced materials. However, in the current environment of the Chafee Amendment, it is difficult for publishers to plan for future accessible products based on universal design. Practical problems, such as the extent to which such products will need to incorporate digital rights management (DRM) technology that reportedly can interfere with some uses of digital publications by individuals with print disabilities, are exacerbated by the uncertainty surrounding the Chafee Amendment's future role.

AAP and its members are unquestionably committed to providing accessible materials, but they believe that the manner in which individual publishers will do that should be a matter of choice for publishers, rather than a matter of restrictive government mandates. If a publisher offers accessible products, there would then be no need for conversion of files by authorized entities or other third parties at the publisher's expense. That principle underlies our recent approaches in connection with legislative efforts. For example, while supporting the "regulatory" approach in the IDEA legislation, which obligates publishers to provide NIMAS-compliant files to the NIMAC, AAP and member publishers successfully urged the inclusion of the alternative option for State or local education agencies to "purchase instructional materials from the publisher that are produced in, or may be rendered in, specialized formats." This issue of choice is also addressed in the Higher Education Act Opportunity Act, where the Advisory Commission, in developing its recommendations for improving timely availability of accessible instructional materials for students, is instructed to consider (among other things) "the feasibility of establishing market-based solutions involving collaborations among publishers of instructional materials, producers of materials in specialized formats, and institutions of higher education." We continue to encourage that collaboration.

Respectfully Submitted,

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